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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-256

NICHOLAS JOSEPH PARRA,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

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FOURTH APPELLATE DISTRICT

Petitioner, NICHOLAS JOSEPH PARRA, prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District,

Second Division, entered in this proceeding on February 21, 1973.

OPINION BELOW

The opinion of the court below is reported at 30 Cal.App.3d 729, 106 Cal. Rptr. 531. A copy of the opinion is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Second Division, (Appendix "A") was filed and entered February 21, 1973. A timely Petition for Hearing in the Supreme Court of the State of California was denied on May 9, 1973, without opinion. A copy of the order denying hearing is attached hereto as Appendix "B". The Court of Appeal, therefore, became the highest court in the State of California in which a decision could

be had.

QUESTIONS PRESENTED

1. Whether a warrantless entry made into a private shop not open for business, solely in order to search for the name and address of the shopkeeper is unreasonable and prohibited by the Fourth and Fourteenth Amendments guarantees of right to privacy and freedom from unreasonable searches and seizures.

2. Whether the Fourth and Fourteenth Amendments to the Constitution require suppression of evidence seized in a warrantless, rummaging and ransacking search of the contents of a desk located inside a private business establishment, which search was conducted solely to ascertain the name and address of the shopowner.

3. Whether a warrantless, rummaging

and ransacking search of the contents of a desk located inside a private business establishment, which search was conducted solely to ascertain the name and address of the shopowner may be justified on the grounds of "exigent circumstances" where it is clear that there are available several reasonable alternatives to the search.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourth and Fourteenth Amendments to the United States Constitution, and the pertinent provisions of California Penal Code §§995 and 1538.5 and Health and Safety Code §11500.5 are set forth as Appendix "C" attached hereto.

STATEMENT OF THE CASE

A. At all times relevant herein

Petitioner conducted a florist business in a store located in a shopping center in Colton, California. About 6:00 p.m. on the evening of September 27, 1971, the police were called and told that the store was apparently closed but the front door was unlocked. An officer checked and saw that the shop door was ajar, although the store was dark and not open for business. The door could be locked only with a key.

He went in. The store was partitioned, the front appearing to be the portion open to the public, the rear appearing to be the private business area. With the aid of a flashlight, the officer looked around. There was no one in the store; it was totally undisturbed. He thoroughly examined both the front and rear portions for the name and address or telephone

number of the shopowner, but found nothing. He went to his car, which was parked immediately in front of the store, and by use of his radio, notified the police station that he could not find the name of a responsible party. A second police officer arrived and the two men went back into the shop. They turned on the lights and looked again, but again did not locate the identity of the owner. The officers proceeded with their search.

There was a desk in the rear, private portion of the store. The police rummaged around the top of the desk, but found nothing. They then pulled open the center drawer of the desk and there found three prophylactics filled with some substance, and tied shut. (It was later determined that the prophylactics contained heroin). The

police continued their search until sometime later, when Petitioner arrived. In response to their inquiry, he identified himself as the shopowner. Petitioner was then arrested and charged with possession of heroin for sale.

B. A preliminary hearing was conducted in the Municipal Court at which Petitioner sought to suppress the evidence because it had been illegally seized in violation of his right of privacy and his right to be free from unreasonable searches and seizures, all guaranteed by the Fourth and Fourteenth Amendments to the Constitution, in the aforementioned warrantless search of his shop. His motion was denied and Petitioner was held to answer.

An information charging Petitioner with possession for sale of heroin in

violation of California Health and Safety Code §11500.5 was filed in the Superior Court. Petitioner made a motion pursuant to California Penal Code §995 to dismiss the information on the grounds that it was not founded on reasonable or probable cause and that it was based on the aforementioned incompetent evidence seized in violation of his aforementioned constitutional rights. This motion was denied. Petitioner then made a motion pursuant to California Penal Code §1538.5 to suppress the aforementioned illegally obtained evidence on the same grounds of constitutional infirmity. This motion was also denied. Petitioner then entered a plea of guilty to the charge and was sentenced to state prison for the term prescribed by law (five to fifteen years).

In accordance with the procedure authorized by California Penal Code

§1538.5(m), Petitioner appealed to the Court of Appeal from the judgment of conviction entered on his guilty plea. His appeal sought to review, on constitutional grounds, the validity of the search and seizure which resulted in the evidence essential to establish his guilt. The Court of Appeal, one judge dissenting, brushed aside his constitutional arguments, holding that the police entry into Petitioner's florist shop did not violate his right of privacy because it was necessary in order to protect the shop and its contents. The court further held that the subsequent search of the desk conducted after it was absolutely plain that neither life nor property had been harmed or disturbed, was justified because of the "exigent circumstance" that the identity of the owner had to be discovered in order to

secure the shop.

The dissenting judge, assuming that necessity justified entry into the shop, said of the purported "exigency" that other alternative means of safeguarding the premises were available: "The officers could have wedged the front door shut, called a locksmith, or paid special attention to the premises during patrol." (Appendix "A", p.14). In short, it was made absolutely clear that the invasion of Petitioner's rights under the Fourth Amendment could have been preserved in a manner entirely consistent with the duty of the police to protect life and property.

A timely Petition for Hearing in the California Supreme Court again raising the federal constitutional questions was denied and this Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

The court below has decided federal questions of substance not heretofore determined by this Court, and decided the federal questions in a way not in accord with applicable decisions of this Court.

1. The Fourth Amendment stricture against unreasonable searches and seizures has as its basic purpose the safeguarding of individual privacy and security from governmental intrusion. Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967). It expresses a purpose "basic to a free society" Wolf v. Colorado, 338 U.S. 25, 27, 69 S.Ct. 1359 (1949). Hence, its guarantees are enforceable against the states through the due process clause of the Fourteenth Amendment. Chimel v. California, 395 U.S. 752,

89 S.Ct. 2034 (1969); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961).

Though the fundamental purpose of the Fourth Amendment is clear, the precise limits of "unreasonable" government conduct are not always apparent. However, this Court has recognized that except within narrowly defined situations, a warrantless, uninvited intrusion into an individual's home or business is unreasonable. See, e.g., See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967); Camara v. Municipal Court, supra.

The states may not carve exceptions out of the general rule that a warrantless search is unreasonable which are inconsistent with the fundamental constitutional guarantees. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971); Chimel v. California, supra. Thus, while a properly limited search of

a dwelling incident to a lawful arrest may be constitutional (Chimel v. California, supra), it is well settled that a warrantless search not incident to a lawful arrest, though based upon probable cause, violates the Fourth Amendment:

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant." Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 6 (1925).

See also Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969 (1970). And, while a warrantless search of an automobile may, under some circumstances, be valid (Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 [1970]), it is repugnant to the Constitution where it is reasonable for the police to obtain a warrant.

Coolidge v. New Hampshire, supra; Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964).

In light of the foregoing fundamental principles sharply limiting the class of cases in which a warrantless search may be deemed reasonable within the meaning of the Fourth Amendment, was it permissible for the police to enter and search Petitioner's store with neither consent nor a warrant, merely to satisfy their curiosity about the condition of the premises and ownership of the store? A majority of the court below, disregarding the constitutionality mandated rule that even probable cause for a search does not excuse the need for a warrant, answered the foregoing question, "Yes." Its decision conflicts with the decisions of this Court and permits a hitherto unknown deprivation of rights of privacy and

security guaranteed by the Fourth and Fourteenth Amendments to the Constitution. It implicates a frequent and recurring problem of the balance between individual rights and police duty and hence raises an important question which should be decided by this Court.

2. The Fourth Amendment protects the non-criminal from official warrantless intrusion into his privacy as much as it does the criminal. Camara v. Municipal Court, supra. And the public interest, while it may require searches, does not necessarily demand warrantless searches. See v. City of Seattle, supra; Camara v. Municipal Court, supra. Hence, in Camara and See, this Court held that a warrantless, routine inspection to enforce building, safety and fire codes was contrary to Fourth Amendment guarantees.

It recognized the necessity for such inspections, but noted that neither the laudable motive of protecting life and property nor the fact that the inspections were not for purposes of uncovering crime justified a warrantless search.

At the same time this Court referred to the possibility that an individual's right to be free from a warrantless search constitutionally might be compelled to give way in an emergency. North American Cold Storage Co. v. City of Chicago, 211 U.S. 306, 29 S.Ct. 101 (1908) (seizure of unwholesome food); Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S.Ct. 358 (1905) (compulsory smallpox vaccination); Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U.S. 380, 22 S.Ct. 811 (1902) (health quarantine). And, in

other cases this Court has mentioned the "emergency" doctrine as one which could excuse the need to obtain a search warrant. See, e.g., Vale v. Louisiana, supra; Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967) (hot pursuit); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966) (destruction of evidence); Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776 (1961); United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93 (1951); Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367 (1948).

But apart from the cases in which warrantless searches have been upheld because a car with its high mobility was involved, or because evidence might otherwise be dissipated, no decision of this Court has held that particular exigencies will justify a warrantless search of a business or home not incident to an arrest.

And no decision appears to have applied the concept of exigency to a case where there was no probable cause, or at least reason to believe that some kind of protective search was necessary. Cf., Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889 (1968).

The court below justified the entry into Petitioner's shop upon the theory that "An unlocked door to a retail establishment after business hours [leads] to the logical conclusion that the circumstance was a threat both to the private and public interests involved." (Appendix "A", p.7). The search itself was justified on the basis that the police could not solve the problem by merely locking the door and leaving. This required a search for the identity of the proprietor who could himself then provide

for the security of the shop.

Was this the type of emergency to which this Court has alluded as authorizing a warrantless search? Isn't an individual's right of privacy and security violated when the police come into his closed store not to apprehend a criminal, reasonably believed to have entered the store; not to halt in midstream a crime reasonably thought to be taking place inside; not even to prevent the destruction of evidence of a crime; but merely to look around and locate the identity of the shopowner? The question is a substantial and recurrent one, implicating the balance between the police duty to protect life and property and the individual's right of privacy and security in his own business. It has never been decided by this Court and requires resolution in this case.

3. Assuming, arguendo, that the initial entry of the police into Petitioner's store, in order to ascertain whether all was well, was not in violation of the Fourth Amendment, could the subsequent general search be justified because of "exigent circumstances"? The exigent circumstances doctrine is an exception to the general rule requiring a warrant. This Court has never accepted it where the obtaining of a warrant was merely inconvenient. See, e.g., Coolidge v. New Hampshire, supra; Vale v. Louisiana, supra. Cf., Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967). This Court has applied the "emergency" doctrine exception only where probable cause existed and the imminent dissipation of evidence justified the immediate warrantless intrusion.

Can the "exigent circumstances"

doctrine survive the mandate of the Fourth Amendment where there is no probable cause and where there are reasonable alternatives available? Terry v. Ohio, supra, implies that probable cause may not always be the appropriate criteria (although it does demand specific facts to justify governmental interference with individual liberty). But what of the fact that alternatives are available? The majority of the court below considered only the desirability of finding the shopowner in order to secure the store. This it held, necessitated and justified the search. The dissent pointed to three reasonable alternatives, any of which would have dissipated the supposed emergency and necessity: The police could have wedged the door shut; they could have called a locksmith; or they could merely have paid special attention to the premises during patrol.

Whether exigent circumstances such as justify a warrantless invasion of privacy and security can exist where there are reasonable alternatives is a substantial, frequent and recurring question which this Court should answer in order to strike the appropriate balance between the protection of private rights and the duty of the police to care for the safety of the public.

4. In Terry v. Ohio, supra, this Court held that a limited intrusion upon an individual did not violate the dictates of the Fourth Amendment although there was no probable cause for arrest, because there was a reasonable basis for a protective search. This Court emphasized that the necessity for even that limited intrusion must clearly be present and that the search which something less than

probable cause justified must be extremely narrow in scope. In Petitioner's case the police first entered the store and ascertained that no robbery was in progress and nothing appeared disturbed. Assuming, arguendo, that that "limited" search did not deprive Petitioner of his rights guaranteed by the Fourth Amendment, wasn't the second investigation of his store and the search of his closed desk drawer beyond the scope of any warrantless search based upon any doctrine of necessity so far developed by this Court? See, e.g., Chimel v. California, supra. Does the necessity to find the owner of a store in order to lock it justify a search of the entire premises, including closed and private places? This significant question regarding the permissible scope of a warrantless search conducted for reasons of police convenience should be answered by this

Court in this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District, Second Division.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION
COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

COURT OF APPEAL-FOURTH DIST.
FILED
FEB 21 1973
JOHN R. McCOWELL, Clerk
Deputy Clerk

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

NICHOLAS JOSEPH PARRA,

Defendant and Appellant.

4 Crim. 5530

(Sup.Ct.No.Cr-25423)

O P I N I O N

APPEAL from a judgment of the Superior Court of San Bernardino County. John P. Knauf, Judge. Affirmed.

Fred A. Lopez, Jr. and Jesse Arias, Jr. for Defendant and Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, William E. James, Assistant Attorney General, and Mark L. Christiansen and Yvonne H. Behart, Deputy Attorneys General, for Plaintiff and Respondent.

Judgment of conviction was entered on a plea of guilty made by defendant Nicholas Joseph Parra to the charge of possession of heroin for sale. (Health & Saf. Code, §11500.5.) Defendant unsuccessfully moved the trial court to suppress certain evidence essential to establish his guilt. By this appeal, he seeks further review of the validity of the search

APPENDIX "A"

and seizure. (Pen.Code, §1538.5, subd. (m).)

At nightfall on Sunday evening, September 27, 1970, police officer Michael Robitzer arrived at a shopping center in Colton in response to a citizen's report that the front door of the Alpar Florist Shop was open. Although a sign on the door announced "Sorry, We Are Closed," Robitzer saw that the door was ajar. The door was made of glass, with a metal frame and push bar, and was hinged to swing both in and out. The lock on the door was of a kind that could be worked only by its key.

Robitzer checked the door and the front window for the name of the proprietor but found none. He then stepped inside the shop and with the aid of his flashlight looked around for the same information, without success. The city business license read only "Alpar Florist." A radio check with the police dispatcher also failed to produce from police records any name or telephone number of the party responsible for the business premises. Robitzer explained the reason for his investigation as follows: "Well, the fact that the door was left open and the building could be entered, the reason we have to have responsible person come down is to check to see if anything is missing, to see if a crime is committed and to secure his building and make sure everything was to his satisfaction before leaving."

Robitzer, a new man on the force, called the shift supervisor for assistance and shortly thereafter Sergeant Paul Connally appeared. The two reentered the shop. Connally explained the purpose for entering the premises as follows: "Our purpose would be to attempt to secure the store for the owner of the business as best we could, contact him and find out if anything, everything was all right, if anything had been taken, anything disturbed."

The officers passed through a partition to the rear portion of the shop. Connally found a light switch and turned on the lights. A kneehole-type desk was near the light switch. An examination of the clutter on the top of the desk yielded no information as to the proprietor of the shop. Connally said, "I thought that quite possibly there would be a business card in the desk and so I opened the large drawer in the center of the desk, the one right under the top of the desk." Upon opening the drawer six or eight inches, Connally saw three translucent prophylactic sheaths, one and one-half inch to two inches in diameter and three or four inches long, tied off at the ends and containing a powdery substance. Connally knew that narcotics are packaged in this way. His knowledge was derived from a class in vice and narcotics control at California State College Los Angeles, departmental schools conducted by the narcotics division, and "training boards with narcotics paraphernalia and substances on them." He had

made arrests for narcotics offenses and was familiar with how heroin was packaged for use on the streets.

Connally untied the end of the prophylactic and saw the "brownish powdery grainy substance" inside. He said that he "had a stronger suspicion at this time that it was, in fact, a narcotic," founded upon "previously seen narcotic heroin substance." Connally put in a call for the department's narcotics officers who subsequently arrived and confirmed that the substance was heroin.

Further search of the top desk drawer revealed more balloons and prophylactics, one of the latter containing "some type of substance inside."

The other drawers of the desk were opened. There and in other parts of the room more balloons and some teaspoons were found but no narcotics were found.

Defendant appeared at the shop about 10 p.m. Robitzer asked defendant if he was the owner of the shop and when defendant said, "Yes," he was placed under arrest. After being advised of his rights, defendant was asked whether the suspected heroin was his. Defendant admitted it was his, that it was heroin, that he got it from Mexico, and that he was dealing in narcotics and had been dealing "since March." When defendant was asked how much heroin there was he said, "Three balloons that are uncut, I cut three to one." Defendant said that he paid $2,500 for the heroin, and that

he received a supply every month or month and a half from which he made $7,500.

Defendant consented to a search of his car in the trunk of which was found a balloon with "some type of substance inside."

The brown powder found in the desk and the automobile was chemically analyzed as 5.2 ounces of heroin.

The first question is whether it was lawful for the officers to enter the shop.

There is nothing in the record to suggest that the officers entered the retail business establishment for any purpose other than to provide for its security. To paraphrase section 197 of the Restatement of Torts (2d ed.), one is privileged to enter and remain on land in the possession of another if it reasonably appears to be necessary to prevent serious harm to the land or chattels of the other party, unless the actor has reason to know that the one for whose benefit he enters is unwilling that he shall take such action. Section 197 is cited by the Supreme Court in People v. Roberts, 47 Cal.2d 374, 377, wherein the court recognizes the privilege of police officers to enter private premises to preserve life or property: "Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose."

According to the uncontradicted and credible evidence before the trial court, the officers entered the Alpar Florist Shop to protect the shop and its contents. Their presence in the shop was privileged.

Two recent Supreme Court cases relied on by defendant, People v. Smith, 7 Cal.3d 282, and Horack v. Superior Court, 3 Cal.3d 720, are inapposite since both involved police intrusions into locked residential premises which were unlawful in their inception.

Concerning Smith, a police officer responded to a landlord's report that the tenant of an upstairs flat had left unsupervised a six-year-old girl. The officer talked to the child, and then directed the landlord to unlock the door to the upstairs flat, ostensibly to ascertain whether the child's mother had returned home in the interim. The trial court had found the evidence insufficient to establish the existence of an imminent and substantial threat to life, health or property, and suppressed the evidence uncovered during the officer's entry. The Supreme Court could perceive no valid justification for reweighing the factual basis of this determination and affirmed the order of the trial court. (7 Cal.3d at pp. 286-287.)

As to Horack, police officers were conducting a noontime investigation of a report that two "hippie type" individuals had been seen entering what was believed to be a vacant residence. When there was no answer to the knock at the locked

front door, the officers entered the house, guns drawn, through an unlocked rear door and proceeded to conduct a room-by-room and closet-by-closet search, which revealed a quantity of contraband. The People contended that the entry and search was authorized by the general duty of the police to investigate, detect and prevent crime and to protect life and property. The Supreme Court held, among other things, that, on the facts, emergency circumstances giving rise to an entrance under compulsion of necessity were simply not present. (3 Cal.3d at p. 725.)

The Supreme Court considered that in both Smith and Horack the belief upon which the officers acted was not the product of facts known to or observed by them but of "a fanciful attempt to rationalize" a justification for warrantless entry. (People v. Smith, supra, 7 Cal. 3d at p. 287.) In this case, unlike Horack, the officers were not engaged in tracking down criminals or evidence of crime, and unlike both Horack and Smith, the officers' reaction in entering the shop was not predicated upon abstractions or speculation but upon the observed fact of an unlocked door to a retail establishment after business hours, leading to the logical conclusion that the circumstance was a threat both to the private and public interests involved.

The next question is whether it was lawful for the

officers to open the desk drawer.

According to the facts, the police were unable to solve the problem by merely locking the door and departing. The next move indicated by the circumstances was to communicate the difficulty to the proprietor who could himself then provide for the security of the shop and its contents. This move was frustrated by the absence of any identification of the proprietor displayed in the shop or recorded in the police department's index. At this point the officers were confronted with three alternatives: one, they could place a guard in the shop, at the expense of police service otherwise available to the community; or, two, they could leave the unlocked shop unguarded and resume patrol; or, three, they could continue efforts to identify and locate the proprietor. To avoid the dilemmas implicit in the first two alternatives, the officers elected the third alternative. Having exhausted the first obvious sources of information, they looked for identification of the proprietor in the next logical place, namely, the top drawer of the desk. The legal issue is whether this conduct offended the Fourth Amendment of the United States Constitution which commands that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.

The protection of the constitution against unreasonable searches and seizures extends to business premises: there is

no formula for the determination of reasonableness and each case must be decided on its own facts and circumstances. (Go-Bart Importing Co. v. United States, 282 U.S. 344 [75 L.Ed 374, 51 S.Ct. 153].)

In a situation analogous to the within case, the Supreme Court has recognized that official reaction to exigent circumstances is equal to the emergency which attracted concern in the first place. (People v. Lanthier, 5 Cal.3d 751.) In Lanthier, a supervisor of university maintenance and security received a complaint of a noxious odor emanating from somewhere in a study hall. Using a master key, he opened each student locker in the hall until, in a locker used by the defendant, he found a briefcase from which the odor was emanating. The official opened the briefcase and saw, in transparent plastic wrapping, material which he suspected might be marijuana. The briefcase was turned over to university police who contacted the sheriff's department. A deputy sheriff identified the material as contraband.

At the preliminary examination, the magistrate found that the official was not looking for contraband or illicit or stolen property or any evidence of guilt of any crime or other offense; that the search was not unreasonable; and that it did not become unreasonable even when the official opened the briefcase. The Supreme Court agreed, holding that the People sustained the burden of showing justification

for the warrantless search by a showing of facts bringing the search within the emergency exception, that is, that a compelling urgency was clearly shown making reasonable a prompt inspection of the premises. (5 Cal.3d at pp. 755-756.) The court also held that once the briefcase was discovered and opened, its contents were in plain sight, and that an observation from a lawful vantage point of contraband in plain sight is not a search in the constitutional sense.

Here, as in Lanthier, the search was not undertaken to seek out evidence of crime. Two distinctions can be made between this case and Lanthier. In Lanthier, the inspection was conducted for the purpose of abating a nuisance. This case involved an emergency presented by the discovery of an unlocked business premise, a situation which, if not a nuisance, nevertheless constituted an invitation to criminality --a condition certainly not less hurtful to the community than the existence of a bad smell. In Lanthier, it was a university official who first inadvertently uncovered the contraband in the course of solving the practical problem presented by the exigent event. In this case it was a police officer who stumbled upon the narcotics. But the court in Lanthier expressly declined to base its decision on this distinction. Rather, it placed its holding squarely on Fourth Amendment principles. (5 Cal.3d at p. 755.)

Appellant does not argue that discovery of the translucent condoms containing a powdery substance and tied off at the ends was other than a "plain sight" of contraband, identical in effect to the discovery in Lanthier of "Baggies" containing a green leafy substance; nor would such an argument be meritorious (cf. People v. Berutko, 71 Cal.2d 84, 90-91).

Finally, consistent with the principle that the scope of a search must be strictly limited to the circumstances which rendered its initiation permissible (Terry v. State of Ohio, 392 U.S. 1, 19 [20 L.Ed.2d 889, 88 S.Ct. 1868, 1878]; Gilbert v. California, 388 U.S. 263, 274-275 [18 L.Ed.2d 1178, 1187-1188, 87 S.Ct. 1951, 1957]; People v. Marshall, 69 Cal.2d 51, 59-60), it is noted that the items found elsewhere in the desk and in the shop subsequent to discovery of the contraband are the unlawful product of a general, unprivileged police search. However, appellant does not raise the point, which can be taken as a concession that the evidence of the first-seen contraband, which by itself would have supported a conviction, was the efficient cause of appellant's guilty plea.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

KAUFMAN
J.

I concur:

ABBERT
J.

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

COURT OF APPEAL-FOURTH DIST.
FILED
FEB 2 1 1973
JOHN R. McDOWELL, Clerk
Deputy Clerk

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

NICHOLAS JOSEPH PARRA,
Defendant and Appellant.

4 Crim. 5530

(Sup.Ct.No.CR-25423)

DISSENTING OPINION

I respectfully dissent.

Assuming that necessity justified entry into the shop to determine whether a burglary was in progress or had been committed (but see Horack v. Superior Court, 3 Cal.3d 720), once the officers checked the premises out and found no unauthorized persons present or evidence of a burglary having been committed, there no longer existed an immediate threat to life, health or property which justified rummaging through the owner's desk drawer however laudable the officers' motives may have been.

The "necessity" upon which the majority seek to justify the search of the desk was no more imminent than the necessity arising out of the quandary faced by the

officers in People v. Smith, 7 Cal.3d 282, as to what to do with the child who had been left alone in her apartment. In Smith the court commended the officers for their solicitude for the child's safety and welfare but pointed out that the issue was "not simply whether the conduct of Officer Brown might have been 'reasonable' under all the circumstances, but whether the People have shown that his entry into Mrs. Blim's home falls within one of the 'few specifically established and well-delineated exceptions' to the warrant requirement. [Citations.]" (7 Cal.3d at 286.) The court held that the "necessity" or "emergency doctrine" "must not be permitted to swallow the rule: in the absence of a showing of true necessity -- that is, an imminent and substantial threat to life, health, or property -- the constitutionally guaranteed right to privacy must prevail." (Emphasis supplied.) (7 Cal.3d at 286.)

People v. Lanthier, 5 Cal.3d 751, is clearly distinguishable. There the noxious odor emanating from the locker constituted a nuisance; it posed a present and imminent threat to the health, safety and welfare of the students. An unlocked business premises, however, without more, does not pose such an imminent threat to life, health or property. The majority poses a threat which was possible but not one which was imminent.

Under the majority holding, if the police were unable to find evidence of the proprietor's identity in the first desk drawer, presumably they could continue to look through the remaining drawers and perhaps even rummage through file cabinets or other personal effects in order to find evidence of such identity. The mere fact of an unlocked business premises cannot be used to justify such a serious and extensive intrusion into a citizen's Fourth Amendment right of privacy. Other alternative means of safeguarding the premises were apparently not considered. The officers could have wedged the front door shut, called a locksmith, or paid special attention to the premises during patrol.

I would hold the search unlawful under People v. Smith, supra, 7 Cal.3d 282, and Horack v. Superior Court, supra, 3 Cal.3d 720, and reverse the judgment.

CERTIFIED FOR PUBLICATION.

/s/ Tamura
Acting P.J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 9 1973

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 4 Crim. *No.* 5530

People

vs.

Parra

Respectfully,

G. E. BISHEL
Clerk

67783-677 10-72 5M OSP

EXHIBIT "B"

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. The provisions of the Fourth Amendment are:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The provisions of the Fourteenth Amendment, Due Process clause:

"***nor shall any State deprive any person of life, liberty, or property, without due process of law;***"

3. The pertinent provisions of

§995 of the California Penal Code are:

"The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases: ...If it be an information: ...That the defendant had been committed without reasonable or probable cause."

4. The pertinent provisions of §1538.5 of the California Penal Code are:

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on * * either of the following grounds:

"(1) The search or seizure without a warrant was unreasonable * * *

"(i) If the property or evidence obtained relates to a felony offense

initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed

within 30 days after the denial of his motion at the special hearing." ....

"(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction

he has moved for the return of property or the suppression of evidence."

5. The pertinent provisions of §11500.5 of the Health and Safety Code are:

"Except as otherwise provided in this division every person who possesses for sale any narcotic other than marijuana shall be punished by imprisonment in the state prison for not less than five years nor more than 15 years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 2 1/2 years in prison."

SUPREME COURT, U. S.
FILED
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JR., CLERK

In The Supreme Court of The United States

October Term 1973

NO. 73-256

NICHOLAS JOSEPH PARRA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE
OF CALIFORNIA
FOURTH APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

NO. 73-256

NICHOLAS JOSEPH PARRA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

The People of the State of California, respondent herein, for the reasons hereinafter set forth, respectfully request that the petitioner's petition for a Writ of Certiorari be denied.

OPINIONS BELOW

On February 1, 1973, the Court of Appeal for the State of California, Fourth Appellate District, Division Two, in an opinion published in 30 Cal. App. 3d 729, 106 Cal. Rptr. 531, affirmed the judgment of conviction of petitioner. (See Appendix A.)

On May 9, 1973, the California Supreme Court denied without opinion a petition for hearing filed by petitioner in that court. (See Appendix B.)

JURISDICTION

It is assumed that petitioner grounds jurisdiction on 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether the action of the police, following a citizen's report and the observation by the police at nightfall that the front door of a florist shop in a shopping center was open although a sign on its door announced that it was closed, and following unsuccessful, exhaustive attempts by the police to obtain by various means the name of the party responsible for the shop, in entering the shop in an effort to ascertain whether a crime had been committed therein, to obtain the name of the owner of the shop, and to secure his premises, and for this purpose in opening the top drawer of a desk therein situated next to the store's light switch, constituted an "unreasonable" search within the proscription of the Fourth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, United States Constitution Amendment IV, California Penal Code sections 995 and 1538.5 and California Health and Safety Code section 11500.5, are set forth in Appendix C.

STATEMENT OF THE CASE

In an information filed January 21, 1971 by the District Attorney of the County of San Bernardino, petitioner was charged with possession of heroin for sale in violation of section

11500.5 of the Health and Safety Code of the State of California. (CT 74 1/.)

On April 14, 1971, petitioner entered a plea of "not guilty." (CT 76.)

Petitioner's motion to set aside the information under section 995 of the California Penal Code was denied by the Court on April 14, 1971. (CT 76.)

On June 21, 1971, pursuant to stipulation, petitioner's motion to suppress the evidence under section 1538.5 of the California Penal Code was submitted on the transcript of the preliminary hearing and some additional evidence. (CT 77.) On June 21, 1971, following hearing thereon, the court denied the motion to suppress evidence finding that the search was reasonable. (CT 78-102.)

On September 21, 1971, petitioner made a motion to withdraw his plea of "not guilty" and to enter a plea of "guilty" to the offense of possession of narcotics for sale. (CT 105.) After oral examination of petitioner the court granted petitioner's motion. (CT 105-106.)

Probation was denied, and the court sentenced petitioner to imprisonment in the state prison for the term prescribed by law, the sentence to run concurrently with any other incomplete sentence. (CT 109-110.)

On December 10, 1971 an appeal from the judgment of

1/ The references CT and RT refer respectively to the Clerk's Transcript and to the Reporter's Transcript on Appeal to the Court of Appeal, Fourth Appellate District, Division Two, State of California, of petitioner's trial in the Superior Court of the County of San Bernardino, California, in case CR-25423. We assume that petitioner has provided the Court with those transcripts. If not, and the Court so desires, we will furnish them on request.

conviction to the California Court of Appeal, Fourth Appellate District, was filed. (CT 111.)

On February 21, 1973, the California Court of Appeal affirmed the judgment of conviction. (See Appendix A.)

Petitioner's petition for a hearing was denied by the California Supreme Court on May 9, 1973. (See Appendix B.)

Petitioner's petition for a writ of certiorari was filed with this Court in August 1973.

STATEMENT OF FACTS

At nightfall on Sunday evening, September 27, 1970, police officer Michael Robitzer arrived at a shopping center in Colton in response to a citizen's report that the front door of the Alpar Florist Shop was open. (CT 5-6, 8, 9.) Although a sign on the door announced that the shop was closed the officer saw from his vehicle that the door of the shop was ajar. (CT 9-10, 87-88.) The door was a glass door with a metal frame which swung in both directions. (CT 6, 87-88.) The lock on the door could not be worked without a key. (CT 10.)

Officer Robitzer looked for the name of a party responsible for the shop outside on the door and the window of the shop. He was unsuccessful. (CT 9-10.) In an effort to obtain the same information he stepped inside the shop and shined his flashlight about inside the shop. He found no identifying information. (CT 11.) The officer contacted his station and had them check the police records for any name or telephone number of a party responsible for the "Alpar Florist." The police had no record of any party on file for that business. (CT 12, 25.) Officer Robitzer explained his reason for his investigation as follows: "Well, the fact that the door was left open and the building could be entered, the reason we have to have responsible person come down is to check to see if anything is missing, to see if a crime is committed and to secure his building and make sure everything was to his satisfaction before leaving." (CT 13-14.)

Officer Robitzer who was a new man on the force, called his shift supervisor for assistance. (CT 12, 52.) Shortly thereafter Sergeant Paul Connolly arrived at the shopping center. (CT 12.) The two officers reentered the shop. (CT 13.) Sergeant Connolly explained the purpose for entering the premises as follows: "Our purpose would be to attempt to secure the store for the owner of the business as best we could, contact him and find out if anything, everything was all right, if anything had been taken, anything disturbed." (CT 43.)

The shop was dark. In an attempt to locate a light switch the officers passed through a partition to the rear portion of the shop. (CT 44.) Officer Connolly found a light switch there and turned on the lights. (CT 44-45.) A desk was near the light switch. (CT 45.) The officers examined the clutter on the top of the desk but were unable to find any information indicating the name of a person connected with the shop. (CT 45.) Sergeant Connolly stated: "I thought quite possibly there would be a business card in the desk and so I opened the large drawer in the center of the desk, the one right under the top of the desk." (CT 45-46.) Upon opening this top drawer of the desk six or eight inches, Sergeant Connolly saw in the cup of the drawer, along with pencils and erasers, three translucent prophylactic sheaths, one and one-half inch to two inches in diameter and three or four inches long, tied off at the ends and containing a powdery substance. (CT 46, 15, 50.) Sergeant Connolly knew that narcotics are packaged in this manner. He had derived this knowledge from a class in vice and narcotics control at California State College in Los Angeles and other educational programs. (CT 47.) He had, as well, made arrests for narcotics offenses and was familiar with the manner in which heroin is packaged for use on the streets. (CT 47-48.)

Officer Connolly untied the end of one of the prophylactics and saw a "brownish powdery grainy substance" inside. (CT 48.) He called the police department, asking them to send the officers in charge of the narcotics program. (CT 49.) The latter arrived thereafter and confirmed that the substance was heroin. (CT 49-50.)

The brown powder found in the prophylactics was later analyzed and found to consist of heroin. (CT 63, 106.)

ARGUMENT

I

THE OFFICERS' ACTIONS WERE TAKEN TO PROTECT PETITIONER'S PROPERTY AND DID NOT CONSTITUTE AN UNREASONABLE SEARCH

Petitioner is requesting this Court to make a determination as to a case which the state court of appeal found on the basis of its peculiar facts not to come within the holdings of the California Supreme Court relied on before the appellate court by the petitioner. *People* v. *Parra*, 30 Cal. App. 3d 729, 733, 734 (1973), Appendix A, pp. 6, 7. Rather, the court of appeal found the case to be closer factually to the situation which existed in another relevant California Supreme Court decision. *Id.* 30 Cal. App. 3d 729, 734, 735, Appendix A, pp. 8, 9; *See People* v. *Lanthier*, 5 Cal. 3d 751, 755-756 (1971).

Thus there is not presented in this case any question with respect to the well-recognized constitutional principles which petitioner has reiterated in his brief before this Court. There is only presented a purely factual application of principles which are well recognized by state law. This does not appear to be a proper subject of consideration by this Court.

Nowhere in the general law or in local ordinances can we find all the duties of a police officer set forth in detail. Indeed, those duties are so varied and undefinable that we could not expect an exact and detailed outline thereof. *Noble* v. *City of Palo Alto*, 89 Cal. App. 47, 53 (1928).

As found by the trial court and the court of appeal the uncontradicted and credible evidence in this case showed that the police officers entered the Alpar Florist Shop for the sole purpose

of protecting the shop and its contents. *People* v. *Parra, supra,* 30 Cal. App. 3d 729, 732-733, Appendix A, pp. 5, 6.

As noted by the California court of appeal in its decision in this case, section 197 of the Restatement of Torts (2d ed.) provides that one is privileged to enter and remain on land in the possession of another if it reasonably appears to be necessary to prevent serious harm to the land or chattels of the other party, unless the actor has reason to know that the one for whose benefit he enters is unwilling that he shall take such action. *Id.* 30 Cal. App. 3d 729, 732-733, Appendix A, pp. 5-6.

Further, it is well within the duty of a police officer to make inquiry and, pending the result of that inquiry, to assure the safety and protection of property, which is otherwise liable to destruction. *Noble* v. *City of Palo Alto, supra,* 89 Cal. App. 47, 53.

And securing property which the police have reasonable cause to believe has been involuntarily left unsecured by its owner has repeatedly been found to be proper police action. *People* v. *Rhodes,* 21 Cal. App. 3d 10, 19-20 (1971); *Noble* v. *City of Palo Alto, supra.* 89 Cal. App. 47, 53.

This Court itself has upheld the lawfulness of police action taken for the protection of private property. Thus, in *Harris* v. *United States,* 390 U.S. 234, 236 (1968), this Court emphasized:

> "The sole question for our consideration is whether the officer discovered the registration card by means of an illegal search. We hold that he did not. The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. The precise and detailed findings of the District Court accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth

> Amendment requires the police to obtain a warrant in these narrow circumstances." *Harris* v. *United States*, 390 U.S. 234, 236 (1968).

Similarly the Supreme Court of California has recognized the privilege of police officers to enter private premises to preserve life or property holding that,

> "Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose." *People* v. *Roberts*, 47 Cal. 2d 374, 377 (1956); *see also People* v. *Lanthier, supra*, 5 Cal. 3d 751, 755-756 (1971).

Whereas in this petition petitioner merely sets forth general undisputed constitutional principles, petitioner had more particularly attempted before the state court of appeal to bring his case within the California Supreme Court holdings of *People* v. *Smith*, 7 Cal. 3d 282 (1972) and *Horack* v. *Superior Court*, 3 Cal. 3d 720 (1970); *See People* v. *Parra, supra*, 30 Cal. App. 3d 729, 733-734; Appendix A, pp. 6-7. The Court of Appeal found those cases "inapposite since both involved police intrusions into locked residential premises which were unlawful in their inception." *People* v. *Parra, supra*, 30 Cal. App. 3d 729, 733; Appendix A, p. 6.

The Court of Appeal stressed that,

> "In this case, unlike *Horack*, the officers were not engaged in tracking down criminals or evidence of crime, and unlike both *Horack* and *Smith*, the officers' reaction in entering the shop was not predicated upon abstractions or speculation but upon the observed fact of an unlocked door to a retail establishment after business hours, leading to the logical conclusion that the circumstance was a threat both to the private and public

interests involved." *People* v. *Parra, supra*, 30 Cal. App. 3d 729, 734; Appendix A, p. 7.

The Court of Appeal found that in this case, as in the California Supreme Court case of *People* v. *Lanthier*, 5 Cal. 3d 751, there existed a compelling urgency making reasonable a prompt inspection of the premises. *Id.* 30 Cal. App. 3d 729, 734-735; Appendix A, pp. 7-8.

It cannot be doubted that the situation discovered presented exigent circumstances requiring immediate action.

Inquiry with the police dispatcher indicated that no name or telephone number of a party responsible for the business premises was on file among the police records. The lock on the glass door of the shop could only be worked with its key. The front window, as well as the door of the store, had been checked for the name of a proprietor, but none had been found. After stepping inside the shop and unsuccessfully looking inside with a flashlight for the same information, Sergeant Connolly had found a light switch near the rear of the shop and turned on the lights. There was a desk near the light switch, but the clutter on the top of the desk yielded no information as to the proprietor of the shop. Sergeant Connolly stated, "I thought that quite possibly there would be a business card in the desk and so I opened the large drawer in the center of the desk, the one right under the top of the desk." (CT 45-46.) The trial court and the Court of Appeal found that the officers had exhausted the first obvious sources of information and were reasonable in looking in the next logical place, namely the top drawer of the desk. (CT 101-102.) *People* v. *Parra, supra*, 30 Cal. App. 3d 729, 734-735; Appendix A, pp. 7-8.

No basis for upsetting this factual determination is apparent.

As pointed up by this Court in *Go-Bart Importing Company* v. *United States*, 282 U.S. 344, 357 (1930), "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." And, as pointed up

by this Court in *Terry* v. *Ohio*, 392 U.S. 1, 21-22, (1967),

> "it is imperative that in assessing the reasonableness of the search, the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry* v. *Ohio, supra*, 392 U.S. 1, 21-22 (1967).

It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (1950); *Cooper* v. *California*, 386 U.S. 58, 62 (1966).

As earlier pointed out, this Court has upheld the reasonableness of police action taken in pursuance of a measure to protect public and private interests. *Harris* v. *United States, supra*, 390 U.S. 234, 236 (1968).

And this Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) has recently reaffirmed the principle that exigent circumstances may justify a warrantless search. *Coolidge* v. *New Hampshire, supra*. As this Court there pointed out, the word "automobile" is not a talisman. *Coolidge* v. *New Hampshire, supra*, 403 U.S. 443, 461. The Court was explicit in pointing out that there existed in the *Coolidge* case not even the inconvenience of having to mobilize a special police detail to guard the automobile. It stressed that by no possible stretch of the imagination could the case be made into one where "it is not practicable to secure a warrant," thus found nothing to invoke the meaning and purpose of the rule of *Carroll* v. *United States*, 267 U.S. 132 (1925). *Coolidge* v. *New Hampshire, supra*, 403 U.S. 443, 462 (1971).

In contrast, as in *Warden* v. *Hayden*, 387 U.S. 294 (1967), "Speed here was essential." *Id.* 387 U.S. 294, 299. In the circumstances of this case, "the exigencies of the situation made [the officers'] course imperative." *Warden* v. *Hayden*, 387 U.S.

294, 298 (1967); *McDonald* v. *United States*, 335 U.S. 451, 456 (1948).

It must be added that one leaving the door of his commercial establishment open at night cannot have a reasonable expectation that the privacy of his premises will not be disturbed. And, as pointed up by this Court in *Katz* v. *United States*, 389 U.S. 347, 351 (1967), "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

Immediately as he opened the top drawer of the desk six or eight inches, Officer Connolly saw contraband in plain view, in the cup of the drawer among pencils and erasers. (CT 14-15.)

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence." *Harris* v. *United States*, *supra*, 390 U.S. 234, 236 (1968).

And, as noted by the Court of Appeal, the evidence immediately observed in plain sight was of itself sufficient to support a conviction, and there was no question raised by petitioner with respect to the search performed subsequent to the discovery of the first observed contraband. *People* v. *Parra*, *supra*, 30 Cal. App. 3d 729, 735-736; Appendix A, p. 9.

Thus with respect to the issues at hand there was neither improper conduct nor improper search by the officers in the circumstances of this case; rather the entry and initial search were authorized by the general duty of the police to investigate, detect, and prevent crime and to protect life and property.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the instant petition be denied.

Respectfully submitted,

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APPENDIX A

***People* v. *Parra*, 30 Cal. App. 3d 729, 106 Cal. Rptr. 531.**

[Crim. No. 5530. Fourth Dist., Div. Two. Feb. 21, 1973.]

THE PEOPLE, Plaintiff and Respondent, v.
NICHOLAS JOSEPH PARRA, Defendant and Appellant.

SUMMARY

A police officer responded to a citizen's report that a florist shop door was unlocked after business hours. There were no lights inside the shop, and, after failing to ascertain the identity of the owner, the officer entered the shop with the intention of finding out who the owner was and notifying him of the situation. In the course of this investigation, the officer opened and unlocked a desk drawer and saw three condoms containing what appeared to be heroin. A narcotics officer was summoned and identified the substance as heroin, and the shopowner was arrested when he appeared on the premises. In a prosecution for possession of heroin for sale (Health & Saf. Code, § 11500.5), defendant was convicted on a plea of guilty after denial of his motions to suppress the heroin. (Superior Court of San Bernardino County, No. CR-25423, John P. Knauf, Judge.)

The Court of Appeal affirmed, finding that the police officers' entry into the shop was for the purpose of protecting the shop and its contents and was therefore privileged. The court further found that the investigation of the officer to ascertain the identity of the owner, including looking in the desk drawer, was reasonable, and that the discovery of the heroin in plain sight was thus not unlawful. (Opinion by Kaufman, J., with Gabbert, J., concurring. Dissenting opinion by Tamura, Acting P. J.)

HEADNOTES

Classified to McKinney's Digest

(1) Searches and Seizures § 21.5—Without Warrant—Validity of Entry.—For the purposes of determining the validity of a search and seizure, a police officer's entry after business hours into an unlocked florist shop was lawful where a citizen's report was received that the door was open, a sign on the door announced that the shop was closed, the owner could not be identified or located, the door could not be locked without a key, and the entry was made for the purpose of protecting the shop and its contents in the absence of the owner.

(2a, 2b) Searches and Seizures § 21—Without Warrant—Reasonable or Probable Cause for Search—Contraband in Plain Sight.—Where a police officer responded to a citizen's report that a florist shop door was unlocked after business hours, and the identity of the owner could not be ascertained, a search, following a privileged entry into the shop, of a desk drawer for the purpose of ascertaining the identity of the shop owner was reasonable, the accidental discovery of packaged heroin in plain sight in the drawer did not constitute an illegal search, and the heroin was thus admissible in the shop owner's prosecution for possession of heroin for sale (Health & Saf. Code, § 11500.5).

[See **Cal.Jur.2d**, Searches and Seizures, § 42; **Am.Jur.**, Searches and Seizures (1st ed § 52).]

(3) Searches and Seizures § 5—Scope of Operation—Business Premises.—The protection of the constitution against unreasonable searches and seizures extends to business premises. There is no formula for the determination of reasonableness, and each case must be decided on its own facts and circumstances.

COUNSEL

Fred A. Lopez, Jr., and Jesse Arias, Jr., for Defendant and Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, William E. James, Assistant Attorney General, and Mark L. Christiansen and Yvonne H. Behart, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KAUFMAN, J.— Judgment of conviction was entered on a plea of guilty made by defendant Nicholas Joseph Parra to the charge of possession of heroin for sale. (Health & Saf. Code, § 11500.5.) Defendant unsuccessfully moved the trial court to suppress certain evidence essential to establish his guilt. By this appeal, he seeks further review of the validity of the search and seizure. (Pen. Code, § 1538.5, subd. (m).)

At nightfall on Sunday evening, September 27, 1970, police officer Michael Robitzer arrived at a shopping center in Colton in response to a citizen's report that the front door of the Alpar Florist Shop was open. Although a sign on the door announced "Sorry, We Are Closed," Robitzer saw that the door was ajar. The door was made of glass, with a metal frame and push bar, and was hinged to swing both in and out. The lock on the door was of a kind that could be worked only by its key.

Robitzer checked the door and the front window for the name of the proprietor but found none. He then stepped inside the shop and with the aid of his flashlight looked around for the same information, without success. The city business license read only "Alpar Florist." A radio check with the police dispatcher also failed to produce from police records any name or telephone number of the party responsible for the business premises. Robitzer explained the reason for his investigation as follows: "Well, the fact that the door was left open and the building could be entered, the reason we have to have responsible person come

down is to check to see if anything is missing, to see if a crime is committed and to secure his building and make sure everything was to his satisfaction before leaving."

Robitzer, a new man on the force, called the shift supervisor for assistance and shortly thereafter Sergeant Paul Connally appeared. The two reentered the shop. Connally explained the purpose for entering the premises as follows: "Our purpose would be to attempt to secure the store for the owner of the business as best we could, contact him and find out if anything, everything was all right, if anything had been taken, anything disturbed."

The officers passed through a partition to the rear portion of the shop. Connally found a light switch and turned on the lights. A kneehole-type desk was near the light switch. An examination of the clutter on the top of the desk yielded no information as to the proprietor of the shop. Connally said, "I thought that quite possibly there would be a business card in the desk and so I opened the large drawer in the center of the desk, the one right under the top of the desk." Upon opening the drawer six or eight inches, Connally saw three translucent prophylactic sheaths, one and one-half inch to two inches in diameter and three or four inches long, tied off at the ends and containing a powdery substance. Connally knew that narcotics are packaged in this way. His knowledge was derived from a class in vice and narcotics control at California State College Los Angeles, departmental schools conducted by the narcotics division, and "training boards with narcotics paraphernalia and substances on them." He had made arrests for narcotics offenses and was familiar with how heroin was packaged for use on the streets.

Connally untied the end of the prophylactic and saw the "brownish powdery grainy substance" inside. He said that he "had a stronger suspicion at this time that it was, in fact, a narcotic," founded upon "previously seen narcotic heroin substance." Connally put in a call for the department's narcotics officers who subsequently arrived and confirmed that the substance was heroin.

Further search of the top desk drawer revealed more balloons and prophylactics, one of the latter containing "some type of substance inside."

The other drawers of the desk were opened. There and in other parts of the room more balloons and some teaspoons were found but no narcotics were found.

Defendant appeared at the shop about 10 p.m. Robitzer asked defendant if he was the owner of the shop and when defendant said, "Yes," he was placed under arrest. After being advised of his rights, defendant was asked whether the suspected heroin was his. Defendant admitted it was his, that it was heroin, that he got it from Mexico, and that he was dealing in narcotics and had been dealing "since March." When defendant was asked how much heroin there was he said, "Three balloons that are uncut, I cut three to one." Defendant said that he paid $2,500 for the heroin, and that he received a supply every month or month and a half from which he made $7,500.

Defendant consented to a search of his car in the trunk of which was found a balloon with "some type of substance inside."

The brown powder found in the desk and the automobile was chemically analyzed as 5.2 ounces of heroin.

(1) The first question is whether it was lawful for the officers to enter the shop.

There is nothing in the record to suggest that the officers entered the retail business establishment for any purpose other than to provide for its security. To paraphrase section 197 of the Restatement of Torts (2d ed.), one is privileged to enter and remain on land in the possession of another if it reasonably appears to be necessary to prevent serious harm to the land or chattels of the other party, unless the actor has reason to know that the one for whose benefit he enters is unwilling that he shall take such action. Section 197 is cited by the Supreme Court in *People* v. *Roberts*, 47 Cal.2d 374, 377 [303 P.2d 721], wherein the court recognizes the privilege of police officers to enter private premises to preserve life or property: "Necessity often

justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose." According to the uncontradicted and credible evidence before the trial court, the officers entered the Alpar Florist Shop to protect the shop and its contents. Their presence in the shop was privileged.

Two recent Supreme Court cases relied on by defendant, *People* v. *Smith*, 7 Cal.3d 282 [101 Cal.Rptr. 893, 496 P.2d 1261], and *Horack* v. *Superior Court*, 3 Cal.3d 720 [91 Cal. Rptr. 569, 478 P.2d 1], are inapposite since both involved police intrusions into locked residential premises which were unlawful in their inception.

Concerning *Smith*, a police officer responded to a landlord's report that the tenant of an upstairs flat had left unsupervised a 6-year-old girl. The officer talked to the child, and then directed the landlord to unlock the door to the upstairs flat, ostensibly to ascertain whether the child's mother had returned home in the interim. The trial court had found the evidence insufficient to establish the existence of an imminent and substantial threat to life, health or property, and suppressed the evidence uncovered during the officer's entry. The Supreme Court could perceive no valid justification for reweighing the factual basis of this determination and affirmed the order of the trial court. (7 Cal.3d at pp. 286-287.)

As to *Horack*, police officers were conducting a noontime investigation of a report that two "hippie type" individuals had been seen entering what was believed to be a vacant residence. When there was no answer to the knock at the locked front door, the officers entered the house, guns drawn, through an unlocked rear door and proceeded to conduct a room-by-room and closet-by-closet search, which revealed a quantity of contraband. The People contended that the entry and search was authorized by the general duty of the police to investigate, detect and prevent crime and to protect life and property. The Supreme Court held, among other things, that, on the facts, emergency circumstances

giving rise to an entrance under compulsion of necessity were simply not present. (3 Cal.3d at p. 725.)

The Supreme Court considered that in both *Smith* and *Horack* the belief upon which the officers acted was not the product of facts known to or observed by them but of "a fanciful attempt to rationalize" a justification for warrantless entry. (*People* v. *Smith*, *supra*, 7 Cal.3d at p. 287.) In this case, unlike *Horack*, the officers were not engaged in tracking down criminals or evidence of crime, and unlike both *Horack* and *Smith*, the officers' reaction in entering the shop was not predicated upon abstractions or speculation but upon the observed fact of an unlocked door to a retail establishment after business hours, leading to the logical conclusion that the circumstance was a threat both to the private and public interests involved.

(2a) The next question is whether it was lawful for the officers to open the desk drawer.

According to the facts, the police were unable to solve the problem by merely locking the door and departing. The next move indicated by the circumstances was to communicate the difficulty to the proprietor who could himself then provide for the security of the shop and its contents. This move was frustrated by the absence of any identification of the proprietor displayed in the shop or recorded in the police department's index. At this point the officers were confronted with three alternatives: one, they could place a guard in the shop, at the expense of police service otherwise available to the community; or, two, they could leave the unlocked shop unguarded and resume patrol; or, three, they could continue efforts to identify and locate the proprietor. To avoid the dilemmas implicit in the first two alternatives, the officers elected the third alternative. Having exhausted the first obvious sources of information, they looked for identification of the proprietor in the next logical place, namely, the top drawer of the desk. The legal issue is whether this conduct offended the Fourth Amendment of the United States Constitution which commands that the right of the people to be secure in their persons, houses, papers and

effects, against unreasonable searches and seizures, shall not be violated.

(3) The protection of the constitution against unreasonable searches and seizures extends to business premises: there is nor formula for the determination of reasonableness and each case must be decided on its own facts and circumstances. (*Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 [75 L.Ed. 374, 51 S.Ct. 153].)

In a situation analogous to the within case, the Supreme Court has recognized that official reaction to exigent circumstances is equal to the emergency which attracted concern in the first place. (*People* v. *Lanthier*, 5 Cal.3d 751 [97 Cal.Rptr. 297, 488 P.2d 625].) In *Lanthier*, a supervisor of university maintenance and security received a complaint of a noxious odor emanating from somewhere in a study hall. Using a master key, he opened each student locker in the hall until, in a locker used by the defendant, he found a briefcase from which the odor was emanating. The official opened the briefcase and saw, in transparent plastic wrapping, material which he suspected might be marijuana. The briefcase was turned over to university police who contacted the sheriff's department. A deputy sheriff identified the material as contraband.

At the preliminary examination, the magistrate found that the official was not looking for contraband or illicit or stolen property or any evidence of guilt of any crime or other offense; that the search was not unreasonable; and that it did not become unreasonable even when the official opened the briefcase. The Supreme Court agreed, holding that the People sustained the burden of showing justification for the warrantless search by a showing of facts bringing the search within the emergency exception, that is, that a compelling urgency was clearly shown making reasonable a prompt inspection of the premises. (5 Cal. 3d at pp. 755-756.) The court also held that once the briefcase was discovered and opened, its contents were in plain sight, and that an observation from a lawful vantage point of contraband in plain sight is not a search in the constitutional sense.

(2b) Here, as in *Lanthier,* the search was not undertaken to seek out evidence of crime. Two distinctions can be made between this case and *Lanthier.* In *Lanthier,* the inspection was conducted for the purpose of abating a nuisance. This case involved an emergency presented by the discovery of an unlocked business premise, a situation which, if not a nuisance, nevertheless constituted an invitation to criminality—a condition certainly not less hurtful to the community than the existence of a bad smell. In *Lanthier,* it was a university official who first inadvertently uncovered the contraband in the course of solving the practical problem presented by the exigent event. In this case it was a police officer who stumbled upon the narcotics. But the court in *Lanthier* expressly declined to base its decision on this distinction. Rather, it placed its holding squarely on Fourth Amendment principles. (5 Cal.3d at p. 755.)

Appellant does not argue that discovery of the translucent condoms containing a powdery substance and tied off at the ends was other than a "plain sight" of contraband, identical in effect to the discovery in *Lanthier* of "Baggies" containing a green leafy substance; nor would such an argument be meritorious (cf. *People* v. *Berutko,* 71 Cal.2d 84, 90-91 [77 Cal.Rptr. 217, 453 P.2d 721]).

Finally, consistent with the principle that the scope of a search must be strictly limited to the circumstances which rendered its initiation permissible (*Terry* v. *Ohio,* 392 U.S. 1, 19 [20 L.Ed.2d 889, 904-905, 88 S.Ct. 1868, 1878]; *Gilbert* v. *California,* 388 U.S. 263, 274-275 [18 L.Ed.2d 1178, 1187-1188, 87 S.Ct. 1951, 1957]; *People* v. *Marshall,* 69 Cal.2d 51, 59-60 [69 Cal.Rptr. 585, 442 P.2d 665]), it is noted that the items found elsewhere in the desk and in the shop subsequent to discovery of the contraband are the unlawful product of a general, unprivileged police search. However, appellant does not raise the point, which can be taken as a concession that the evidence of the first-seen contraband, which by itself would have supported a conviction, was the efficient cause of appellant's guilty plea.

The judgment is affirmed.

Gabbert, J., concurred.

TAMURA, Acting P. J.— I respectfully dissent.

Assuming that necessity justified entry into the shop to determine whether a burglary was in progress or had been committed (but see *Horack* v. *Superior Court*, 3 Cal.3d 720 [91 Cal. Rptr. 569, 478 P.2d 1]), once the officers checked the premises out and found no unauthorized persons present or evidence of a burglary having been committed, there no longer existed an immediate threat to life, health or property which justified rummaging through the owner's desk drawer however laudable the officers' motives may have been.

The "necessity" upon which the majority seek to justify the search of the desk was no more imminent than the necessity arising out of the quandary faced by the officers in *People* v. *Smith*, 7 Cal.3d 282 [101 Cal.Rptr. 893, 496 P.2d 1261], as to what to do with the child who had been left alone in her apartment. In *Smith* the court commended the officers for their solicitude for the child's safety and welfare but pointed out that the issue was "not simply whether the conduct of Officer Brown might have been 'reasonable' under all the circumstances, but whether the People have shown that his entry into Mrs. Blinn's home falls within one of the 'few specifically established and well-delineated exceptions' to the warrant requirement. [Citations.]" (7 Cal.3d at p. 286.) The court held that the "necessity" or "emergency doctrine" "must not be permitted to swallow the rule: in the absence of a showing of true necessity— that is, *an imminent and substantial threat to life, health, or property*—the constitutionally guaranteed right to privacy must prevail." (Italics supplied.) (7 Cal.3d at p. 286.)

People v. *Lanthier*, 5 Cal.3d 751 [97 Cal.Rptr. 297, 488 P.2d 625], is clearly distinguishable. There the noxious odor emanating from the locker constituted a nuisance; it posed a present and imminent threat to the health, safety and welfare of

the students. An unlocked business premises, however, without more, does not pose such an imminent threat to life, health or property. The majority poses a threat which was *possible* but not one which was *imminent.*

Under the majority holding, if the police were unable to find evidence of the proprietor's identity in the first desk drawer, presumably they could continue to look through the remaining drawers and perhaps even rummage through file cabinets or other personal effects in order to find evidence of such identity. The mere fact of an unlocked business premises cannot be used to justify such a serious and extensive intrusion into a citizen's Fourth Amendment right of privacy. Other alternative means of safeguarding the premises were apparently not considered. The officers could have wedged the front door shut, called a locksmith, or paid special attention to the premises during patrol.

I would hold the search unlawful under *People* v. *Smith, supra,* 7 Cal.3d 282, and *Horack* v. *Superior Court, supra,* 3 Cal. 3d 720, and reverse the judgment.

APPENDIX B

Order denying hearing.

Attorney General
Room 5006
1350 Front St.
San Diego, CA 92101

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

MAY 9 1973

DEAR SIR: *I have this day filed Order*

DOCKET
CR. SD.
NO. 72-63

Entered by bg

Date 5-9-73 HEARING DENIED

In re: 4 Crim. *No.* 5530

People
vs.
Parra

Respectfully,

G. E. BISHEL
Clerk

07733-077 10-72 5M OBP

APPENDIX C

U.S. Const. amend. IV

Ca. Pen. Code §§ 995, 1538.5.

Ca. Health & Saf. Code § 11500.5

UNITED STATES CONSTITUTION

AMENDMENT IV

Seizures, Searches and Warrants

[Section 1.]* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Proposed September 25, 1789; ratified December 15, 1791.

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* Words in brackets added.

CALIFORNIA PENAL CODE SECTION 995

§ 995. Cases in which indictment or information must be set aside

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.

2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been committed without reasonable or probable cause.

(Enacted 1872. Amended by Code Am.1880, c. 118, p. 43, § 1; Stats.1911, c. 256, p. 435, § 1; Stats.1927, c. 854, p. 1756 § 1; Stats.1939, c. 457, p. 1806, § 1; Stats.1949, c. 1311, p. 2298, § 1.)

CALIFORNIA PENAL CODE SECTION 1538.5

§ 1538.5. [Motion for return of property or suppression as evidence: Special hearings: New complaint or indictment: Appeals: Review by mandate or prohibition: Stay of proceedings: Dismissal of action: Release of defendant: Bail: Motions based on freedom of speech or press]

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property

shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice

to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and

the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

(l) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the

defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status

of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

CALIFORNIA HEALTH AND SAFETY CODE

SECTION 11500.5

§ 11500.5 Possession for sale of narcotic other than marijuana; punishment; prior convictions. Except as otherwise provided in this division every person who possesses for sale any narcotic other than marijuana shall be punished by imprisonment in the state prison for not less than five years nor more than 15 years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 2½ years in prison.

If such person has been previously once convicted of any felony offense described in this division or has been previously once convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison for not less than 10 years, and shall not be eligible for release upon completion of sentence, or parole, or on any other basis until he has served not less than six years in prison.

If such a person has been previously two or more times convicted of any felony offense described in this division or has been previously two or more times convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned in the state prison for not less than 15 years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 15 years in prison. (Added Stats.1961, c. 274, p. 1302, § 2.)